Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses	)	
	)	
Comcast Corporation and	)	MB Docket No. 02-70
AT&T Corp., Transferors,	)	
	)	
To	)	
	)	
AT&T Comcast Corporation,	)	
Transferee	)	

COMMENTS OF
THE PROGRESS & FREEDOM FOUNDATION

I. Introduction and Summary

The Progress & Freedom Foundation ("PFF" or "Foundation"), a private, non-profit, non-partisan research institution established in 1993 to study the digital revolution and its implications for public policy, hereby submits these comments in response to the Commission's request for comment concerning the above-referenced applications.[1] The applications seek approval for the proposed transfer of control of licenses that will result from the spin-off of AT&T Broadband

[1] Public Notice, DA 02-733, MB Docket No. 02-70, March 29, 2002. The views contained in these comments are the views of the comments' author and do not necessarily reflect the views of the directors, officers, or staff of the Foundation.

Corp. ("AT&T Broadband") to AT&T's shareholders, and the subsequent merger of AT&T Broadband and Comcast Corporation into AT&T Comcast.[2]

At bottom, in the context of today's rapidly changing and converging digital environment, the Commission should view the proposed merger as pro-competitive, efficiency-enhancing, and consistent with the public interest. And it should not allow the indeterminate nature of the public interest standard to serve as an opportunity for opening a "regulation by condition" bazaar, as has often been the case in the past with respect to the Commission's handling of merger proposals.

PFF's research focuses heavily on issues related to the development of a competitive and less regulated communications environment, especially one that fosters the more rapid deployment of broadband digital communications and other new technologies. For example, our recently published book, *Communications Deregulation and FCC Reform*, contains essays proposing comprehensive reform across several areas of the FCC's regulatory regime.[3] In the recent past, we have submitted comments in proceedings relating generally to broadband deployment and regulation,[4] the appropriate regulatory framework

[2] See Applications and Public Interest Statement filed by AT&T Corp. and Comcast Corporation on on February 28, 2002.
[3] See Jeffrey A. Eisenach and Randolph J. May, *Communications Deregulation and FCC Reform* (Boston: The Progress & Freedom Foundation and Kluwer Academic Publishers, 2001).
[4] Comments of the Progress & Freedom Foundation , *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange* Carriers, CC Docket No. 01-338, April 5, 2002; Comments of the Progress & Freedom Foundation, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans*, CC Docket No. 98-146, September 24, 2001; Reply Comments of the Progress & Freedom Foundation, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans*, CC Docket No. 98-146, October 5, 2001.

for interactive digital services,[5] and the impact of "open access" regulation on cable broadband services.[6]

Our research has shown that the "digital revolution" has spurred innovative products and services delivered in a variety of new ways, reduced prices, increased productivity, and contributed dramatically to consumer choice and economic prosperity.[7] Our annual survey, "The Digital Economy Fact Book," is often cited in chronicling the growth of the digital economy.[8]

We have recently submitted comments in the Commission's *Cable Ownership Proceeding*[9] and also the proceeding in which EchoStar and Hughes seek approval for merger of their direct broadcast satellite ("DBS") systems.[10] Our comments in those proceedings, in large part, establish the parameters of our views concerning the way in which the AT&T Broadband/Comcast merger proposal should be evaluated.

In our Cable Ownership Comments, we pointed out that the Commission's own then-most recent January 2001 *Video Programming* report, while documenting that cable remains the dominant provider in the multichannel video programming distributor ("MVPD") marketplace, had concluded that "competitive

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[5] Comments of the Progress & Freedom Foundation, *Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7, March 19, 2002.
[6] Comments of the Progress & Freedom Foundation, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, December 1, 2000.
[7] For citation to various authorities, see our comments and reply comments in the Commission's most recent Section 706 Inquiry, CC Docket No. 98-146, filed on September 24 and October 5, 2001.
[8] For the most recent edition, see Jeffrey A. Eisenach, Thomas M. Lenard and Stephen McGonegal, *The Digital Economy Fact Book, Third Edition* (Washington, DC: The Progress & Freedom Foundation, 2001).
[9] See Comments of the Progress & Freedom Foundation, *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, CC Docket No. 98-82, January 4, 2002 (hereinafter "Cable Ownership Comments").
[10] See Comments of the Progress & Freedom Foundation, *EchoStar Communications Corporation*, CS Docket No. 01-348, February 4, 2002 (hereinafter "EchoStar/Hughes Comments").

alternatives and consumer choices continue to develop."[11] Even then, based on June 2000 data, the Commission had stated that "[t]he most significant convergence of service offerings continues to be the pairing of Internet service with other service offerings."[12] And the Commission had added that, as cable companies continue to expand the broadband infrastructure that permits them to offer high speed Internet access, as well as telephony, "[t]here is evidence that a wide variety of companies throughout the communications industries are attempting to become providers of multiple services, including data access."[13]

Based on this evidence, along with other evidence of changes in marketplace conditions, the Cable Ownership Comments observed that: "An industry subject to rapid and unpredictable change, particularly one driven by technological innovation, is not one in which market structures and firm organizations should be dictated by overly restrictive rigid rules."[14] In urging the Commission to fashion minimally restrictive ownership limits, we pointed out that the 1992 Cable Act directs the Commission to take into account "the dynamic nature of the communications marketplace."[15]

Commenting in February 2002 on the proposed EchoStar/Hughes merger, we stated:

> Simply put, the proposed merger can be looked at one of two ways: Either it is a merger to monopoly in the market for satellite TV services, or it is a merger between two of many competitors in an increasingly dynamic and diverse market for the provision of electronic video programming and

[11] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report, FCC 01-1, CS Docket No. 00-132, January 8, 2001, at para. 5.
[12] Seventh Annual Report, at para. 11.
[13] Seventh Annual Report, at para. 11.
[14] Cable Ownership Comments, at 12.
[15] Cable Ownership Comments, at 12, citing 47 U.S.C. § (f)(2)(E).

> related digital communications services. We believe the merger should properly be viewed in the latter context and, when it is, that the potential benefits of the merger for consumers and competition far outweigh the potential costs.[16]

We supported the proposed merger as pro-competitive and efficiency-enhancing when viewed through a lens "that focuses on what is, and what will soon be, the converged market for digital information services."[17] Viewed through that same lens, we support the AT&T Broadband/Comcast proposal as well.

II. The AT&T Broadband/Comcast Merger Proposal Is Pro-Competitive and Efficiency-Enhancing

Just as we did not view the EchoStar/Hughes merger as "a merger to monopoly in market for satellite TV services," we do not view the AT&T/Comcast proposal "a merger to market for cable TV services." Rather, it is a merger of two competitors in the dynamic and converging digital information and communications marketplace.[18] In that context, we view it as a pro-competitive and efficiency-enhancing combination that will promote consumer welfare, and, therefore, is in the public interest. As we put it in comments over three and a half years ago in connection with another merger proceeding:

> [T}his technological revolution is causing telecommunications providers to fundamental re-think and remake their business strategies. As they do, they find that their existing asset configurations are no longer efficient. As a result, the pace of acquisitions and divestitures has increased dramatically, as companies seek to create the mix of assets best suited to competing in this new technological environment.[19]

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[16] EchoStar/Hughes Comments, at 2.
[17] EchoStar/Hughes Comments, at 4.
[18] Of course, even if the relevant market were viewed in a more limited (and unrealistic) sense as the "cable television" market, AT&T Broadband and Comcast largely do not presently compete against each other as operators of cable systems.
[19] Comments of the Progress & Freedom Foundation, *GTE Corporation and Bell Atlantic*, CC Docket No. 98-184, December 23, 1998, at 6.

AT&T and Comcast make an extensive public interest showing in support of their application, and we do not propose here to add much to what already has been put on the record on this score. We do believe, as the applicants contend, that the merger is likely to promote more facilities-based competition for high-speed Internet access and other broadband services, as well as more facilities-based competition in the local telephone market.

As the Commission itself has recognized over and over again, it is facilities-based competition—not regulated resale—that, in the long run, will most benefit consumers by stimulating investment and innovation.[20] In a converging marketplace, what we would like to see is competition among the presently-denominated "cable", "satellite", "telephone", and "wireless" companies for offerings which include some or all of the presently-denominated "video", "voice", and "data" services. The economies of scale and scope and synergies produced by the merger should make the combined company a stronger facilities-based infrastructure provider in this changing and converging digital marketplace.[21] And based upon the representations of the applicants, the combined entity will be

[20] See, eg, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, CC Docket No. 01-338, December 20, 2001, at para. 9; Implementation of the Telecommunications Act of 1996, Third Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238, November 5, 1999, at para. 219; Promotion of Competitive Networks in Local Telecommunications Markets, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141, July 7, 1999, at para. 4.

[21] As put a few months ago: "As for the big mergers confronting the FCC—EchoStar/Hughes, AT&T/Comcast, and who knows what else—they likely represent predictable responses to today's rapidly changing business and technological environment. These firms are scrambling to achieve the economies of scale needed to produce an integrated array of services: video, voice, and Internet access." Randolph J. May, "*FCC Rules Slow Progress*," USA Today, January 2, 2002, at p. 8A.

compliant with all of the Commission's rules, including the currently invalidated cable ownership restrictions.[22]

We have no hesitancy in voicing support for the proposed merger as "in the public interest" in light of the pro-competitive and efficiency-enhancing benefits it is likely to produce. Nonetheless, a word concerning the Commission's public interest review of license transfers is in order since the AT&T/Comcast and EchoStar/Hughes mergers are the first major ones to come before the newly-constituted Commission. They offer the agency an opportunity to show that it can do more than pay lip service to regulatory reform.

Too often in the (recent) past the Commission has used license transfer applications as a means of imposing "voluntary" conditions upon merger applicants, conditions that bear little or no relationship to any issues arguably raised by the specific proposal.[23] This "regulation by condition," or what Rep. Billy Tauzin, now Chairman of the House Commerce Committee, has called "personalized regulation," is enabled by virtue of the Commission's authority to review merger proposals under the indeterminate "public interest" standard.[24] As Chairman Tauzin put it, in the past the agency seemed to say (but not openly) to applicants: "[I]f you happen to have before us an application for …merger,…you're stuck in our room. You're not coming out of that room until

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[22] Applications, at pages 48-64.
[23] See Randolph J. May, "Any Volunteers," *Legal Times,* March 6, 2000, at 62; Comments of the Progress & Freedom Foundation, *GTE Corporation and Bell Atlantic*, CC Docket No. 98-184, December 23, 1998, at 20-24.
[24] W.J.(Billy) Tauzin, *Telecom Deregulation, Broadband Deployment and Economic Growth*, in Jeffrey A. Eisenach and Randolph J. May, *Communications Deregulation and FCC Reform* (Boston: The Progress & Freedom Foundation and Kluwer Academic Publishers, 2001), at 223.

you agree to the conditions that we want to impose upon you're particular application in this emerging, competitive marketplace."[25]

Without rehashing gruesome details from various past mergers, consider just the SBC/Ameritech merger. The application seeking approval occasioned a 14-month process that eventually resulted in the applicants' "voluntary" acceptance of 30 separate regulatory conditions filling more than 60 pages.[26] Some of these conditions, such as one requiring the applicants to roll out a certain percentage of their advanced services to low-income neighborhoods, arguably might make sense as a matter of policy in the context of a generic rulemaking applicable to all similarly-situated companies. But there was no suggestion that SBC's or Ameritech's roll-out policies should differ from other carriers or that the merger was relevant to their own plans in this regard.

At the conclusion of the SBC/Ameritech process, then-FCC Commissioner Furthgott-Roth stated: "What emerged [from the process] was a set of conditions that only those willing to contort the English language could call "voluntary"".[27] In the same vein, then-Commissioner Powell added: "I do not subscribe to… the idea that a regulated entity can 'voluntarily' offer an commit to broad-ranging and legal obligations and penalties. There is never anything voluntary about the regulatory relationship."[28]

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[25] Id., at 223-24.
[26] *Ameritech Corp. and SBC Communications Inc.*, 14 FCC Rcd 14712 (1999)(Appendix C).
[27] Press Statement of Commissioner Harold Furthgott-Roth in re SBC-Ameritech License Transfer Proceeding, October 6, 1999.
[28] *Ameritech Corp. and SBC Communications Inc.*, 14 FCC Rcd 14712, 15201 (1999)(Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part).

The Commission on its own authority can substantially reform the merger review process, consistent with fulfilling its responsibilities to make the public interest determination required by the Communications Act. First, while the competitive impact of the merger is an element (usually the central element) of the public interest assessment, as a matter of policy, the Commission should largely defer to the antitrust authorities' competition review. Although the FCC has tried to frame its competitive review under the public interest standard in slightly different terms than the test used by the antitrust authorities, in reality, the Commission examines essentially the same market information and performs basically the same analysis. In order to avoid duplicative work by two government agencies and to reduce the burdens and costs imposed on both the private sector and the government, the FCC should rely heavily on the Department of Justice or FTC analysis.

Second, the Commission should refrain from imposing conditions that are specific to the merger applicants where a generic rulemaking is the more appropriate forum to address the concern which motivates the Commission to seek the condition. In other words, the Commission should avoid the temptation to use the merger review process as an opportunity to "regulate by condition."[29]

No doubt, as a matter of law, the courts have interpreted the public interest standard in a way that gives the Commission very broad discretion, rejecting contentions that the standard is so indeterminate that it constitutes an

[29] See Randolph J. May, "Any Volunteers," *Legal Times,* March 6, 2000, at 62.

unconstitutional delegation of legislative authority.[30] Nevertheless, there is nothing that prevents the Commission from cabining its discretion as a matter of sound administrative law and policy.[31] Indeed, several years ago, then-Commissioner Powell forcefully made this very point:

> I believe we need to reassess the Commission's application of the public interest standard. Specifically, I believe it is imperative that we try to enunciate principles that will discipline the broad discretion we have held historically, and therefore assist dealmakers in the market in guessing what we will do even before we do it. …[I]t is more important that we adopt some limiting principles. …[B]y adopting such principles, we may release from the "black box" the regulatory fears of private actors in the market, who understandably assume that what they don't know about regulators' future decisions may hurt them.[32]

Since Chairman Powell delivered those remarks, the Commission has yet to adopt any meaningful limitations on the exercise of its public interest discretion. This merger proceeding may not be the place for the Commission to adopt a new policy containing across-the-board limiting principles. Nevertheless, it is surely the case that the Commission can begin such reform process by ensuring that its public interest review is narrowly focused. The best way to do this is to give substantial deference to the competitive analysis of the antitrust authorities and to refrain from considering issues unrelated to the specific impact of the merger.

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[30] See Randolph J. May, "*The Public Interest Standard: Is It Too Indeterminate To Be Constitutional*, 53 FEDERAL COMM. L. J. 427 (2001).

[31] See Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L. J. 1399, 1415 (2000)("Thus, the newly emerging delegation doctrine upholds the congressional transfer of lawmaking authority to administrative agencies, but imposes restraints on the exercise of that authority. Instead of demanding intelligible principles from Congress, it permits agencies to select their own standards, consistent with the broad purposes of the statutory scheme.")

III. Conclusion

For the foregoing reasons, in the context of today's rapidly changing and converging digital environment, the Commission should view the proposed merger as pro-competitive, efficiency-enhancing, and consistent with the public interest. It should not allow the indeterminate nature of the public interest standard to serve as an opportunity for opening a "regulation by condition" bazaar, as has often been the case in the past.

Respectfully submitted,

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[32] Michael Powell, "Bewitched, Bothered and Bewildered, Remarks to the Federal Communications Bar Association, October 28, 1998.